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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1313

JOHN W. KEMPE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 94–104) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered April 3, 1947 (R. 104). The petition for a writ of certiorari was filed May 2, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the allegations of the information are too indefinite and uncertain to support petitioner's conviction.

2. Whether certain jurors should have been disqualified for cause by reason of their voluntary services on local AAA committees which made recommendations as to the issuance of gasoline rations to farmers.

3. Whether the evidence supports petitioner's conviction.

4. Whether the United States Attorney was guilty of prejudicial misconduct during the course of the trial.

5. Whether the trial court properly instructed the jury on the elements of the offenses charged in the information.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Second War Powers Act and the Emergency Price Control Act and of Ration Order 5C and Maximum Price Regulation 88 promulgated thereunder are set forth in the Appendix, *infra*, pp. 14–21.

STATEMENT

On December 8, 1944, by leave of court (R. 5), an information in eight counts was filed in the District Court for the Northern District of Iowa, charging petitioner with violations of the Second War Powers Act, 1942, and of the Emergency

Price Control Act of 1942 (R. 1–5). At an earlier trial on this information, petitioner was acquitted on counts 1, 2, 5, 6, 7 and 8 (see R. 1–2, 3–4) and convicted on counts 3 and 4. This conviction was reversed on appeal because the trial court erred in admitting evidence of offenses other than those charged. *Kempe* v. *United States,* 151 F. 2d 680 (C. C. A. 8). The instant case involves petitioner's retrial on counts 3 and 4 (see R. 95). These counts, which are referred to by petitioner and the court below as counts 1 and 2, charged, that on October 4, 1944, petitioner sold one C. T. Studley, a gasoline station operator, 500 gallons of premium (ethyl) gasoline without receiving appropriate ration coupons therefor (count 1) and at a price in excess of the applicable ceiling price (count 2). After a jury trial, petitioner was found guilty on both counts (R. 87), and he was sentenced to imprisonment for one year on each, the sentences to run concurrently (R. 88). On appeal to the Circuit Court of Appeals for the Eighth Circuit the conviction was affirmed (R. 104).

The evidence in support of the conviction may be summarized as follows:

C. T. Studley testified that he operated a filling station at 2024 West Fourth Street, Sioux City, Iowa (R. 36). He stated that on October 4, 1944, he bought 200 gallons of ethyl gasoline from petitioner and paid him $39 in cash [19½ cents per

gallon], and that he did not give petitioner gasoline ration coupons for this delivery at any time (R. 36–37, 57–58). The transfer of this gasoline to Studley's tanks was observed by O. P. A. agents from a position near the station (R. 39, 41). The agents had followed petitioner from his home at about 5:30 A. M. on October 4 to the Studley station (R. 39), and they arrived at the station just before daylight (R. 41–42, 46). The gasoline was run through a hose from petitioner's truck to the center inlet of a series of three tank inlets at the station (R. 41). Petitioner testified that this middle inlet was for ethyl gasoline (R. 53).

Petitioner's defense was that the October 4 delivery he made to Studley consisted only of 640 gallons of regular, not ethyl, gasoline, for which Studley paid him $93.44, or 14.6 cents per gallon, and that Studley gave him enough ration coupons to cover that delivery (R. 52–53). In support of his testimony, petitioner introduced evidence showing that on October 4, 1944, his supplier sold him 1260 gallons of regular gas (R. 50–51, 53–54; Def. Ex. A, R. 49, 71). He also introduced a receipt for 640 gallons of regular gasoline purportedly signed by Studley on October 4 (R. 53–54, 55; Def. Ex. B, R. 56, 73).[1] However, a de-

[1] Petitioner also introduced a series of other invoices for sales to Studley. See Defts. Ex. UU to BBB, R. 54, 74–77. Petitioner testified that these sales slips were made out by him in Studley's presence for deliveries from May through September 1944. However, it is important to note that one

fense witness, an official of the company from which petitioner purchased gasoline, testified that their warehouse did not usually open until 7:00 A. M. (R. 51), and that the 1260 gallon sale of regular gasoline to petitioner was made on October 4 (R. 50). Studley testified that he did not receive from petitioner any receipt covering the October 4 delivery or any other delivery (R. 59–60) and that the signature on the October 4 receipt was not his (R. 59).

ARGUMENT

1. Petitioner's first contention is that counts 1 and 2 of the information are void because they are so vague, indefinite and uncertain as not to inform him of the charges against him (Pet. 29–44).

Count 1 charged that petitioner, on October 4, 1944, in Sioux City, Woodbury County, Iowa, being in the business of selling gasoline to retail establishments in tank wagons, knowingly, wilfully and unlawfully sold and delivered 500 gallons of gasoline to C. T. Studley, who resold gasoline at a retail establishment at Sioux City, Iowa, without receiving the appropriate ration coupons, "all in violation of Ration Order No. 5C (7 Federal Register 9135), as amended, a regulation made under the Second War Powers Act of 1942 (Sections 631 to 645a, both inclusive, Title 50, United

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of the slips (Ex. YY, R. 76) bears the date July 19, 1946, 19 months after the information was filed (R. 1) and over one month after the present trial (see R. 31, 87).

States Code)" (R. 2). The allegations of count 2 were essentially the same, except that the gasoline delivered was alleged to be premium motor gasoline, and the violation charged was that the sale was effected at a price of 19½ cents a gallon, which was in excess of his ceiling price of 16.1 cents per gallon prescribed by Section 7.4 of "Maximum Price Regulation 88 (9 Federal Register 1783) a regulation made under the Emergency Price Control Act of 1942 (Section 901 to 946, both inclusive, Title 50, United States Code)" (R. 2–3).

We submit, as the court below held both on appeal from petitioner's original conviction (see 151 F. 2d 680, 683–684) and on the present appeal (see R. 96–97), that these counts fully and properly alleged all the necessary elements of the offenses in such detail as to afford petitioner a reasonable opportunity to prepare his defense and to protect him against subsequent prosecution for the same offenses.

By and large, petitioner's attack on the sufficiency of these counts is merely an unspecific denunciation of O. P. A. indictments and informations in general; his only specific objections to the information here are that it failed to state the specific address in Sioux City, Iowa, where the offenses were committed, and that it failed to set forth the specific sections of the statutes, ration order and price regulation, or the specific United States Code and Federal Register citations of such

sections. These contentions are patently frivolous.[2]

2. Petitioner contends that three of the prospective jurors should have been disqualified for cause, on the ground that they were, at the time of the trial, or had been employees of the United States (Pet. 28, 44–50). These prospective jurors were or had been members or alternate members of Iowa county AAA committees, one of the functions of which, during the war but not at the time of the trial below, was to make recommendations for the issuance of gasoline rationing coupons to farmers for the operation of farm machines (see R. 32).[3]

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[2] While it does not go to the matter of the sufficiency of the information, we note that petitioner also questions the legality of Maximum Price Regulation No. 88 because of the fact that his ceiling prices were required to be determined by reference to the price lists of the Standard Oil Company of Indiana (Pet. 32). Since it does not appear that petitioner asserted in the trial court that the price regulation was unconstitutional on its face for that reason (see R. 18–19), or that he sought determination of its validity by an appropriate proceeding in the Emergency Court of Appeals (see Section 204 of the Emergency Price Control Act of 1942, 50 U. S. C. App., Supp. V, 924), the question as to the validity of the regulation cannot now be considered. *Yakus* v. *United States*, 321 U. S. 414, 443–447.

[3] Juror Benker, who was excused on petitioner's peremptory challenge, was a member of the committee at the time of the trial below (R. 32). Duncan and Lullman, who were merely alternate members of the committee and had never been called upon to act (R. 33, 34), served on the jury after petitioner's challenge for cause was overruled (R. 34, 31).

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We submit that the court below conclusively answered petitioner's contention in holding (1) that since the AAA committeemen received no compensation for their services and were not appointed by or paid for their services by the United States, petitioner had failed to show that they should be disqualified for cause by reason of the provision of the Iowa statute permitting such a challenge where a master-servant relationship existed between a prospective juror and a party;[4] and (2) that it did not appear that the jurors in question might be biased toward the United States, because it was not shown whether the AAA committees acted in the interest of the Government or in aid of farmers in the latters' efforts to procure satisfactory gasoline allotments (R. 97–100).

3. Petitioner claims that the Government failed to prove the charges of the information and that, therefore, the case should not have been submitted to the jury (Pet. 28, 50–52). This contention is bottomed on the conflict between Studley's testimony and petitioner's testimony and the corroborating evidence offered by him to show that he had purchased regular, not ethyl, gasoline from his supplier on October 4, 1944, and that Studley had signed and received from petitioner a copy of an invoice for regular gasoline. This

[4] See Section 275, Judicial Code (28 U. S. C. 411) conforming federal juror qualifications to state law.

corroborating evidence, of course, was relevant only to count 2, charging the price violation, and does not affect the proof of the ration violation on which petitioner received an identical and concurrent sentence. Moreover, petitioner's corroborating evidence was effectively undermined by the evidence showing that the delivery to Studley was made in the early morning hours of October 4 at a time earlier than petitioner's supplier usually opened, that at the Studley station the gasoline was unloaded in a tank reserved for ethyl gasoline, that Studley did not sign or receive a receipt for the gasoline delivered on October 4, and that the receipt dated October 4 may have been fabricated for the purposes of the trial (see fn. 1, *supra*, pp. 4–5). In any event, resolution of these conflicting evidential factors was a matter for the jury, and their verdict of guilty removes this issue from appellate consideration where, as here, there is substantial evidence to support the verdict. *Glasser* v. *United States*, 315 U. S. 60, 80.

4. Petitioner also urges that the United States Attorney was guilty of such misconduct in certain phases of the examination of witnesses and in his closing argument that petitioner did not have a fair trial (Pet. 28, 52–60). Petitioner first points to the episode where, after defense counsel had asked Studley on cross-examination how many times he had purchased gasoline from

petitioner and Studley answered that he did not remember, the prosecutor said, "I want the Court to note that question. He has opened the door now" (R. 37). Petitioner argues that this remark left the implication that he was guilty of other offenses not charged in the information (Pet. 53). However, as the court below noted (R. 101–102), defense counsel apparently did not so regard the remark at the time because he made no objection or exception, nor did he move for a mistrial or request an appropriate admonitory instruction. Furthermore, the remark was meaningless to the jurors because they had not participated in the first trial in which introduction of evidence of other offenses caused a reversal.

Petitioner points also to a question asked him on cross-examination by the prosecutor as to whether he had attempted to buy ration coupons. However, the trial court sustained a defense objection to this question and cautioned the jury to disregard its implications. (R. 54–55.)

The next episode referred to by petitioner is the prosecution's examination of an O. P. A. inspector concerning the witness' conversation with petitioner while he was in jail pending trial. The inspector testified that he told petitioner he was interested in the "higher-ups" and wanted petitioner to disclose the source of his gasoline coupons, and that petitioner did not reply but just sat there and looked down (R. 64–66). Petitioner

argues that since he was under no duty to answer the inspector, the testimony as to his silence was highly prejudicial. Petitioner did not so articulate his objection to this testimony at the trial, nor did he raise this question in the court below (see R. 101–103). In any event, it is settled that the prosecution can introduce testimony showing that when confronted with damaging accusations in a situation calling for a response, the defendant remained silent. See Wharton's *Criminal Evidence* (11th ed.), Vol. 2, p. 1089; *Egan* v. *United States,* 137 F. 2d 369, 380–381 (C. C. A. 8), certiorari denied, 320 U. S. 788; see also *Quinn* v. *United States,* 158 F. 2d 177, 181 (App. D. C.), certiorari denied, February 17, 1947, No. 741, this Term; *Gentili* v. *United States,* 22 F. 2d 67 (C. C. A. 9); *Price* v. *United States,* 5 F. 2d 650 (C. C. A. 6).

Lastly, petitioner objects to the assertedly intemperate remarks of the prosecutor in his closing argument referring to the failure of the defense to demand that the Government produce the ration coupons petitioner claimed to have received from Studley and stating that the reason no such demand was made was because there were no such coupons (R. 67–68, Pet. 58). Again, we submit that the court below effectively disposed of this objection in holding (R. 103) that the challenged remarks did not exceed the bounds of legitimate argument, because under the rationing system cancelled coupons remained Government property

and if petitioner's testimony were true, he could have obtained the alleged coupons on demand. Hence, the prosecutor was justified in calling the jury's attention to the legitimate inference that petitioner did not receive coupons from Studley as he claimed.

5. Petitioner's final contention is that the trial court failed to quote or give the context of the pertinent statutes and regulations and that such failure constituted reversible error, citing *Morris* v. *United States,* 156 F. 2d 525 (C. C. A. 9) (Pet. 60–65). Since petitioner did not request any such instructions or except to the instructions given, it would seem that this contention is not now open to him. See opinion below at R. 103–104. In any event, petitioner's contention ignores the instructions actually given. While the trial judge did not quote verbatim the applicable statutes and regulations, nor paraphrase them in their precise form or sequence, his instructions clearly, concisely and adequately explained the elements of the offenses charged. See instructions Nos. 3, 5, and 6, R. 81, 82–83. Such instructions were wholly lacking in the *Morris* case.

CONCLUSION

The judgment below is correct and petitioner's contentions merit no further review by this Court. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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MAY 1947.

APPENDIX

The Act of June 28, 1940, c. 440, 54 Stat. 676, as amended by the Act of May 31, 1941, c. 157, 55 Stat. 236, and by Title III of the Second War Powers Act of March 27, 1942, c. 199, 56 Stat. 177, 50 U. S. C. App., Supp. V, 633 (50 U. S. C. App., Supp. V, 1152), provides in pertinent part:

> SEC. 2 (a) (2). * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.
>
> * * * * *
>
> SEC. 2 (a) (5). Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.
>
> * * * * *
>
> SEC. 2 (a) (8). The President may exercise any power, authority, or discretion conferred on him by this subsection (a),

through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

Ration Order 5C (7 F. R. 9135) provided in pertinent part:

§ 1394.8207 [7 F. R. 9157] *Restriction on transfers.* Except as provided in § 1394.8209, no dealer or distributor shall transfer or offer to transfer gasoline to any other dealer or distributor and no dealer or distributor shall receive a transfer of gasoline, except in exchange for a quantity of coupons or other evidences, at the time of the actual delivery of the gasoline or in advance thereof, equal in gallonage value to the amount of the gasoline so transferred, or, in cases in which gasoline is regularly transferred to him on a temperature adjustment basis, equal in gallonage value to the adjusted quantity of gasoline so transferred: *Provided, however,* That coupons or other evidences need not be exchanged for a transfer of gasoline between licensed distributors unless in the course of transit between such licensed distributors the gasoline is delivered to a dealer or intermediate distributor for redelivery to the transferee: *Provided further,* That transfers of gasoline may be made only in exchange for coupons bearing the notations required by paragraphs (d) and (e) of § 1394.8004 and paragraph (b) of § 1394.8206.

§ 1394.8301 (b) [7 F. R. 9160] Any person who wilfully performs any act prohibited, or wilfully fails to perform any act required, by any provision of Ration Order No. 5C may upon conviction be

fined not more than $10,000 or imprisoned for not more than one year, or both, and shall be subject to such other penalties or action as may be prescribed by law.

The Emergency Price Control Act of 1942, 56 Stat. 23 (50 U. S. C. App., Supp. V, 901 *et seq.*) provided in pertinent part:

> Sec. 4 (a) [50 U. S. C. App., Supp. V, 904 (a)] It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.
>
> * * * * *
>
> SEC. 205 (b) [50 U. S. C. App., Supp. V, 925 (b)] Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Adminis-

trator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

Maximum Price Regulation No. 88 (9 F. R. 1783) provided in pertinent part:

SEC. 1.13 [9 F. R. 1785] *Compliance with this regulation required.* (a) On and after the effective date of this regulation regardless of any contract, obligation or understanding, no person shall sell or deliver and no person shall buy or receive in the course of trade or business any petroleum products covered by this regulation at prices higher than the maximum prices fixed by this regulation, and no person shall agree, offer, or attempt to do any of these things. Prices lower than the maximum prices may, of course, be charged and paid.

* * * * *

(c) *Penalties for non-compliance*—(1) *In general.* Any person violating a provision of this regulation is subject to the criminal penalties, civil enforcement actions and suits for treble damages provided by the Emergency Price Control Act of 1942 as amended.

* * * * *

Sec. 1.14 [9 F. R. 1785] *Definitions.* * * * (e) "Tank wagon price" means the price at which a petroleum product is sold and delivered by tank wagon to the ultimate consumer of the particular product or to a person who resells the product at a retail establishment.

(f) "Tank wagon area" as used in this regulation means the reference seller's tank wagon area served from any given point (see Article VII for designated reference sellers).

Sec. 1.15 [9 F. R. 1786] *How to ascertain a particular maximum price under this regulation*—(a) *Prices of fuel oil and fuels (except waste lubricating oil or re-refined lubricating oil prices)*. After you have read Article I containing various general provisions, check Article II and ascertain whether there is a specific maximum price at the shipping or delivery point involved in your sale; if not, and if you are selling a fuel oil of the types mentioned in Article III, your maximum price will be established or determined under one of the tables therein and the provisions of the Article. If neither Article II nor III applies, it may be that your maximum price can be determined from one of the formulas set forth in Article V.

If it can be, then you should also examine Article VI carefully to ascertain whether there are any additions which may be made or any reductions which must be made to the formula price. Note that more than one addition to the maximum price determined under Article V may be provided by Article VI. If you are concerned with a maximum tank wagon price, Article VII should then be examined. It deals with provisions for determining a maximum tank wagon price at the point of sale in accordance with the maximum tank wagon price of the state's reference seller at the same point. Note two things: First, if you have not been able to ascertain your maximum price under any preceding Ar-

ticle of the regulation, you may adopt the reference seller's price providing he has one at that particular point, and second, even if your price has been determined under Article V you may nevertheless at some points adopt the reference seller's price instead if it is higher than your own, though at other points you are required to take the reference seller's price even if it is lower than yours.

If you have not been able to ascertain a maximum price under the aforementioned Articles, you should then apply to the Office of Price Administration for a maximum price pursuant to the provisions of Article VIII.

SEC. 5.2 [9 F. R. 1804–1805] *In accordance with price charged on specified sales in a base period*—* * * (c) *Maximum prices of fuel oil, fuels, gasoline and liquefied petroleum gas.* Where the maximum price for fuel oil, fuel, liquefied petroleum gas, or gasoline at a given shipping or delivery point cannot be determined under section 5.1 the maximum price for each seller at such shipping or delivery point, except as provided hereunder in paragraph (d), shall not exceed the price charged at that point by him on the last sale of the same product to a purchaser of the same class within 60 days prior to October 15, 1941. Where the product is sold on a delivered basis at a given point the maximum price shall be the price charged by the seller on the last sale of the same product to a purchaser of the same class made on a delivered basis at that point in the period specified. Where the product is sold at a given point on an f. o. b. shipping point basis the maximum price shall be the price charged by the

seller on the last f. o. b. shipping point sale at that point to a purchaser of the same class in the period specified.

* * * * *

SEC. 7.2 [9 F. R. 1807] *Designated reference sellers.* The companies hereinafter named are the reference tank wagon sellers for any point in the Continental United States, in the state, states or districts set out opposite the name of the company: *Provided,* That such company has an applicable maximum price for such point:

For any point in the State of:	Reference tank wagon sellers

* * * * *

Iowa_____Standard Oil Company of Indiana.

* * * * *

SEC. 7.4 [9 F. R. 1808] *In the States of Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, South Dakota and Wisconsin—products for which use of reference seller's maximum prices are required*—(a) *Maximum tank wagon prices.* A seller's maximum tank wagon price for a particular grade of gasoline, kerosene, range or stove oil, distillate fuel oil, diesel fuel, or tractor fuel, at a particular point in any of the States of Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, or Wisconsin shall be either the reference tank wagon seller's normal price, as posted on October 1, 1941, for the same grade of the particular product at the same point or the sum of said reference seller's maximum tank wagon price for such product at the same point as established under other provisions of this

regulation and .7¢ per gallon, whichever is the lower, except that in the case of tractor fuel if a tank wagon seller's maximum price as determined under other provisions of this regulation is higher than such maximum price shall remain in effect.

If the reference seller has no established maximum price at a particular point for a particular grade of any of the products named above, then a tank wagon seller's maximum price shall be his maximum price as determined by other provisions of this Regulation.

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